


FILED

APR 29 2009


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN GRAHAM, a/k/a/ John Boy Patton,
VINE RICHARD MARSHALL, a/k/a
Richard Vine Marshall, a/k/a
Dick Marshall,

Defendants.

CR 08-50079

ORDER

Pending before the Court is Defendant's Marshall's Motion to Dismiss for Selective Prosecution, Doc. 108. Defendant Marshall has failed to make *prima facie* case that he has been the target of a selective prosecution. Both Graham and Looking Cloud have been vigorously prosecuted with those two Defendants having the strongest cases against them as being the two who allegedly marched the victim to the site of her execution and carried out the execution. Richard Marshall was indicted later and there appears to be strong evidence against him although not as strong as that against Looking Cloud and Graham. There is evidence against Theda Clarke but the evidence in this case and the Looking Cloud case is that Theda Clarke is in her 80s and has been in a nursing home for some time. The documents that the Court reviewed in camera in this case before they were, pursuant to the Court's Order, turned over to the defense in the present case indicated that Theda Clarke suffers and has suffered for some time from a significant amount of health problems. It appears that Theda Clarke is an American Indian, as are Arlo Looking Cloud and Richard Marshall. John Graham is a Canadian Indian. The three male Defendants are similar in age, not in nursing homes, and apparently with no serious health problems.

There has been no showing of any impermissible motive in bringing this case against Richard Marshall. There is no adequate showing that the bringing of the charges was because of race, religion, age, or as a result of Richard Marshall asserting his constitutional rights. There is a

claim that Richard Marshall was charged because he would not cooperate with the United States. There is nothing to support that claim other than his apparently being asked to cooperate and his being charged after he refused to cooperate. That is no showing of "intentional and purposeful discrimination" by the prosecution. *U.S. v. Kelley*, 152 F. 3d 881, 886 (8th Cir. 1998). When these crimes were originally charged in 2003 against Defendants Graham and Looking Cloud, there apparently was not adequate evidence to charge Richard Marshall. It was only after Mr. Looking Cloud was convicted in 2004 and then some time after that when he began cooperating with the United States that it appears there was enough evidence to charge Richard Marshall. It appears that the same is true of Theda Clarke, but by the time Mr. Looking Cloud was cooperating, Theda Clarke's health had deteriorated to the point where, coupled with her age from a trial tactic point of view it reduced the strength of the case against her.

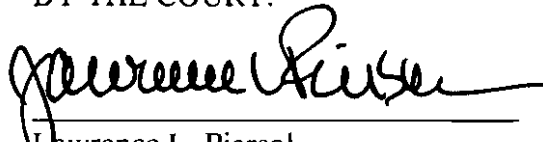
It is not selective prosecution for the prosecution to charge those who, all things considered, they have a better chance of convicting. That appears to be the case here as opposed to the Defendant showing any impermissible motive for the prosecution of Richard Marshall. Accordingly,

IT IS ORDERED:

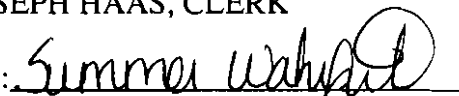
1. That Defendant Marshall's Motion to Dismiss for Selective Prosecution, Doc. 108, is denied.

Dated this 29th day of April, 2009.

BY THE COURT:


Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: 
DEPUTY